Supreme Court, U.S.
FILED
JUN 8 - 2010
OFFICE OF THE CLERK

No. 09-1360

IN THE

Supreme Court of the United States

TOTES-ISOTONER CORPORATION,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF OF *AMICI CURIAE* COLUMBIA SPORTSWEAR COMPANY, *et al.* IN SUPPORT OF PETITION

STEVEN H. BECKER
Counsel of Record
SUZANNE I. OFFERMAN
BAKER & MCKENZIE LLP
1114 Avenue of the Americas
New York, NY 10036-7703
(212) 626-4100
Steven.Becker@bakermckenzie.com

Counsel for Amici Curiae

230326

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

TABLE OF CONTENTS

	Page
TABLE OF CITED AUTHORITIES	iii
INTEREST OF *AMICI CURIAE*	1
SUMMARY OF THE ARGUMENT	2
ARGUMENT	4
I. Equal Protection Clause Jurisprudence Has Evolved to Prohibit Gender- and Age-Discriminatory Customs Tariffs	4
A. *Bell's Gap's* Particular Proscription Against Discrimination "Unknown to the Practice of Our Governments" Supports Totes' Claim of an Equal Protection Violation	4
B. A Cause of Action for Gender- and Age-Based Discrimination Within the Single Class of Goods Established in the Tariff — Seamed Leather Gloves — Is Not Defeated By the Government's Allegations That Men's and Women's Gloves Move in Different Channels of Trade	8
II. Totes Has Met the Pleading Standard of *Bell Atlantic Corp. v. Twombly*	11

Contents

Page

III. Legislative History Supports Totes' Claims that the Gender- and Age-Based Tariffs Appearing in the HTSUS Violate the Equal Protection Clause 13

A. The Tariff Classification Study Casts Doubt on the Justification for Duties Discriminating on the Basis of Gender or Age 13

B. Congressional Hearings on Tariffs Undermine the Federal Circuit's Assumption that the Current 1.4% Difference in Duty Between Men's and Women's Gloves Will Foster the Glove Industry Even if Rational Basis is Applied 17

CONCLUSION 21

TABLE OF CITED AUTHORITIES

Page

CASES

Bell's Gap R. Co. v. Pennsylvania,
134 U.S. 232 (1890) 2, 4, 5, 8

Bell Atlantic Corp. v. Twombly,
550 U.S. 544 (2007) ..... *passim*

Bolling v. Sharpe,
347 U.S. 497 (1954) 4

Carolene Products Co. v. United States,
323 U.S. 18 (1944) 14

Chambers v. Time Warner, Inc.,
282 F.3d 147 (2nd Cir. 2002) 14

Conley v. Gibson,
355 U.S. 41 (1957) 12

Craig v. Boren,
429 U.S. 190 (1976) 6

Eastalco Aluminum Co. v. United States,
916 F.2d 1568 (Fed. Cir. 1990) 14

Harper v. Virginia Bd. of Elections,
383 U.S. 663 (1966) 2, 7, 8

Lonza, Inc. v. United States,
46 F.3d 1098 (Fed. Cir. 1995) 14

Cited Authorities

Page

Malloy v. Hogan,
378 U.S. 1 (1964) 7

Nissho-Iwai American Corp. v. United States,
143 F.3d 1470 (Fed. Cir. 1998) 14

Plessy v. Ferguson,
163 U.S. 537 (1896) 7

Reed v. Reed,
404 U.S. 71 (1971) 5

Totes-Isotoner Corp. v. United States,
594 F.3d 1346 (Fed. Cir. 2010) 8, 9, 12, 13, 17

United States v. Virginia,
518 U.S. 515 (1996) 10

Yick Wo v. Hopkins,
118 U.S. 356 (1886) 11

Washington v. Davis,
426 U.S. 229 (1976) 11

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. V 2, 4

U.S. Const. amend. XIV, §1 ..... *passim*

U.S. Const. amend. XIX 6

Cited Authorities

Page

STATUTES

Customs Simplification Act of 1954 14

Harmonized Tariff Schedule of the United States 1, 9, 13, 14

Tariff Schedule of the United States 14, 15, 16

COURT RULES

Federal Rule of Civil Procedure 8(a)(2) 11

U.S. Court of International Trade Rule 8(a)(2) 11

LEGISLATIVE HISTORY

Speech of Mr. Severance, of Maine, on the Tariff, 28th Cong. 12-13 (May 3, 1844) 5

Tariff Classification Study, Schedule 7, U.S. Tariff Commission (1960) 3, 13, 14, 15, 16

Tariff Hearings before the Comm. on Ways and Means, 60th Cong. 7120-21 (1909) 18, 19

Tariff Hearings before the Comm. on Ways and Means, 54th Cong. 1955 (1897) 6

Tariff Hearing before the Comm. on Ways and Means, 54th Cong. 1927-28 (1897) 17, 18

INTEREST OF *AMICI CURIAE*

Columbia Sportswear Company, Mountain Hardwear, Inc., Payless ShoeSource, Inc., The Stride Rite Corporation, and Mia Shoes, Inc., by their filing of this brief as *amici curiae*, respectfully urge this Court to grant the petition for a writ of certiorari filed by Totes-Isotoner Corporation ("Totes").[1] *Amici curiae* are importers of footwear and apparel who have filed cases in the United States Court of International Trade ("CIT"), challenging the constitutionality of provisions of the Harmonized Tariff Schedule of the United States ("HTSUS" or "tariff") that discriminate in taxation based on gender and age.

This case is significant for these *amici* and over one hundred other importers of footwear and apparel because their cases are stayed in the CIT, pending the outcome of this case. Damages in the form of a potential

---

1. No counsel for a party authored this brief in whole or in part except that counsel for petitioner reviewed this brief and provided comments to counsel for *amici*. No counsel for a party or party made a monetary contribution intended to fund the preparation or submission of this brief. In addition to *amici curiae*, the following companies represented by counsel for *amici* will make a monetary contribution to the preparation or submission of this brief: Jimlar Corporation, Maggy London International, Ltd., Kohl's Department Stores, Inc., Esportia International, Inc., Group E, Ltd., Kids in Motion, and Stone Barn Industries, Inc. (f/k/a Steve and Barry's), and/or Stone Barn Manhattan LLC and/or 4004 Incorporated). The parties have been given appropriate notice of amici's intention to file and have consented to the filing of this brief. Such consents are being lodged herewith.

refund of duties paid on men's, women's or children's footwear and apparel, stemming from a violation of the Equal Protection guarantees under the Due Process Clause of the Fifth Amendment, hinge on whether this Court recognizes that Totes has stated a claim for gender and age discrimination.

Although *amici* fully endorse Totes' petition, in this brief they also urge that Totes' claim is further supported (i) by the discrimination having been "unknown to the practice of our governments," *Bell's Gap R. Co. v. Pennsylvania*, 134 U.S. 232, 237 (1890), due to earlier limitations on the scope of protection afforded under the Equal Protection Clause, and (ii) by Totes having met the pleading standard of *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and (iii) the legislative history which supports Totes' claims of an equal protection violation.

SUMMARY OF THE ARGUMENT

This Court has warned that discrimination "unknown to the practice of our governments, might be obnoxious to the constitutional prohibition." *Bell's Gap R. Co. v. United States*, 134 U.S. 232 (1890). Although gender-based customs tariffs existed as early as the 1800s, the discrimination inherent in those tariffs was unknown to the government until recent times because gender was not part of equal protection jurisprudence until the 1970s. "Notions of what constitutes equal treatment for purposes of the *Equal Protection Clause do* change," *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 669 (1966), and have evolved to prohibit gender- and age-based discriminatory tariffs. They must now be struck down.

Totes' claim of an Equal Protection violation is grounded in the plain language of the tariff, which discriminates on its face on the basis of gender or age. The tariff establishes that "seamed leather gloves" are a single class of goods and the only subclassification or distinction drawn is based on gender and age. The Federal Circuit's reliance on the government's unsubstantiated allegations that men's and women's gloves move in different channels of trade and thus, must be different goods, is misplaced, particularly at the pleading stage. Any such alleged business reasons for the discrimination do not justify dismissal for failure to state a claim.

In addition, Totes has met the "plausibility" standard in its pleadings, established under *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), in which this Court held that stating a claim "requires a complaint with enough factual matter (taken as true) to suggest that" a claim is "plausible." *Id.* at 556. The legislative history, including the Tariff Classification Study and congressional tariff hearings, supports Totes' claim that the gender and age discrimination in the tariff violates the Equal Protection Clause and presents "enough fact to raise a reasonable expectation that discovery [or further proceedings on the merits] will reveal evidence of illegal [conduct]." *Id.*

Passages from the Tariff Classification Study demonstrate that the government itself has questioned the economic justification for distinctions in the tariff based on gender and age, thereby undermining any argument that such gender- and age-based distinctions bear a substantial relationship serving an important

governmental purpose. Passages from the tariff hearings further show that the current small difference in duty rates discriminating against men's gloves can not protect a domestic industry making men's gloves, if it even exists.

Finally, the Federal Circuit should not have applied a merits-based rational basis test to conclude that Totes did not state a claim, in any event, when a claim of gender discrimination would be reviewed under intermediate scrutiny on the merits.

ARGUMENT

I. Equal Protection Clause Jurisprudence Has Evolved to Prohibit Gender- and Age Discriminatory Customs Tariffs.

A. *Bell's Gap's* Particular Proscription Against Discrimination "Unknown to the Practice of Our Governments" Supports Totes' Claim of an Equal Protection Violation.

In *Bell's Gap R. Co. v. Pennsylvania*, 134 U.S. 232 (1890), this Court found that the protections granted under the Equal Protection Clause of the Fourteenth Amendment apply to property as well as to people.[2]

2. The direct text of the Equal Protection Clause applies only to state governments, but the federal government is also bound by the same rules of equal protection by the Fifth Amendment's Due Process Clause. *See Bolling v. Sharpe*, 347 U.S. 497, 499 (1954) ("The *Fifth Amendment* . . . does not contain an *equal protection clause* as does the *Fourteenth Amendment* which applies only to the States. But the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive.").

States are permitted to "vary the rates of excise upon various products . . . so long as they proceed within reasonable limits and general usage." *Bell's Gap*, 134 U.S. at 237. But, the Court cautioned that equal protection principles control those different rates of exaction because differing rates that are "clear and hostile discriminations against particular persons and classes, *especially* such as are of an unusual character, *unknown to the practice of our governments*, might be obnoxious to the constitutional prohibition." *Id.* (emphasis added).

That abhorrent degree of discrimination — "unknown to the practice of our governments" — is present here, thereby precluding the argument that gender and age discrimination should not be struck down because it has long been recognized as acceptable by the government. What has been "unknown to the practice of our governments" must be measured by the standards and jurisprudence of the times.

Although gender-based customs tariffs on seamed leather gloves existed as early as 1890, and for other apparel and footwear products, even earlier than the ratification of the Fourteenth Amendment in 1868, *see, e.g.*, Speech of Mr. Severance, of Maine, on the Tariff, 28th Cong. 12-13 (May 3, 1844), the problematic discrimination inherent in those gender-based tariffs was unknown to the government until recent times. This Court did not recognize gender as a quasi-suspect class until the 1970s when it first struck down a law based on a gender classification in *Reed v. Reed*, 404 U.S. 71 (1971). Intermediate scrutiny for classifications based on gender was not firmly established until the mid-

1970s, when this Court decided *Craig v. Boren*, 429 U.S. 190 (1976). At the genesis of gender discrimination in the tariff in the nineteenth century, and indeed, even for most of the twentieth century, gender was simply not considered part of equal protection jurisprudence.[3]

This is not to say that gender discrimination in the tariff was ever acceptable, even though no legal remedy existed during that period in history. To the contrary, today we would never consider slavery acceptable, even prior to the Equal Protection Clause in 1868. Nor would we ever consider women's lack of suffrage acceptable, even prior to the ratification of the Nineteenth Amendment permitting women to vote in 1920.

---

3. In 1896, during congressional tariff hearings, the Temple Glove Manufacturing Company asked that Congress eliminate the discrimination between men's and women's gloves:

> We pray you to right the great wrong done the manufacturers of ladies' gloves under the Wilson tariff and to equalize the duty on both men's and women's gloves, as the cost of making and finishing is the same. The discrimination in the Wilson tariff was simply the result of compromises, and we trust that under a Republican Government it will not be repeated.

Tariff Hearings Before the Comm. on Ways and Means, 54th Cong. 1955 (1897) (statement of Temple Glove Manufacturing Company). Even at the turn of the nineteenth century, manufacturers knew of the gender discrimination, but had no remedy to rectify such gender-based duty discrimination.

Although these discriminations existed, they were "unknown" at their inception and for years following, as equal protection jurisprudence had to evolve over time for the government to recognize these injustices. As late as 1920, the Equal Protection Clause was still considered insufficient to guarantee a women's suffrage—hence the need for a new and separate constitutional amendment. In the same way, gender discrimination in the tariff was never acceptable, but the evolution of equal protection principles has been gradual, and only *recently* do they make clear that gender-based duties are unconstitutional, despite their lurking in the tariff for many years.

As explained in *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966):

> [T]he *Equal Protection Clause* is not shackled to the political theory of a particular era. In determining what lines are unconstitutionally discriminatory, we have never been confined to historic notions of equality, any more than we have restricted due process to a fixed catalogue of what was at a given time deemed to be the limits of fundamental rights. See *Malloy v. Hogan, 378 U.S. 1, 5-6*. Notions of what constitutes equal treatment for purposes of the *Equal Protection Clause do* change. This Court in 1896 held that laws providing for separate public facilities for white and Negro citizens did not deprive the latter of the equal protection and treatment that the *Fourteenth Amendment* commands. *Plessy v. Ferguson, 163 U.S. 537*. Seven of the

> eight Justices then sitting subscribed to the Court's opinion, thus joining in expressions of what constituted unequal and discriminatory treatment that sound strange to a contemporary ear.

383 U.S. at 669 (emphasis in original).

The Equal Protection Clause has only recently caught up with gender and age discrimination. What constituted equal treatment for purposes of equal protection has changed. Because gender-based tariff discrimination in violation of the Equal Protection Clause has been "unknown to the practice of our governments," it is particularly deserving of this Court's scrutiny. *Bell's Gap R. Co.*, 134 U.S. at 237.

B. A Cause of Action for Gender- and Age-Based Discrimination Within the Single Class of Goods Established in the Tariff — Seamed Leather Gloves — Is Not Defeated By the Government's Allegations That Men's and Women's Gloves Move in Different Channels of Trade.

Citing to the brief of the government, in which the government made the unsupported allegation that historically men's and women's gloves were sourced differently, the Federal Circuit concluded that "[m]en's and women's gloves are separate commodities, moving in different channels of trade and presenting different commercial issues with respect to domestic manufacturers." *Totes-Isotoner Corp. v. United States*, 594 F3d 1346, 1354 (Fed. Cir. 2010). Apparently for this reason, the Federal Circuit rejected Totes' argument that "the

tariff classification is unconstitutional because it discriminates between similar property — men's gloves and women's gloves" and found that "Totes has failed to allege facts sufficient to show that men's and women's gloves are property of the same class." *Id.* at 1354.

Yet, in the tariff, the government itself has established that seamed leather gloves constitute a single class of goods. It draws no further distinctions or subclassifications based on physical characteristics. The only distinction it does draw is based on gender and age — whether the gloves are for men or women and children.[4] When a statute,

---

4. The Tariff provides:

4203	Articles of apparel and clothing accessories, of leather or of composition leather:	
	* * *	
	Gloves, mittens and mitts:	
	* * *	
4203.29	Other:	
	Other [than seamed]:	
	Other	
4203.29.30		*Men's . . . 14%*
		For Other persons:
4203.29.40		Not lined: . . . *12.6%*
4203.29.50		Lined: . . . *12.6%*

(emphasis added). The only distinctions made within the class of seamed leather gloves are gender and age. Seamed leather gloves for men are dutiable at 14%, while seamed leather gloves for women and children are dutiable at only 12.6%. No other distinction is made within the class of seamed leather gloves.

as here, discriminates on its face on the basis of gender or age, the government's unsupported allegations of business reasons purportedly justifying the discrimination can not negate the adequacy of a properly plead Equal Protection claim.

The time, if any, to consider purported business or policy reasons for the tariff's discrimination between men's and women's gloves is during a trial on the merits, when the government may attempt to show that the tariff's gender- and age-based discrimination withstands scrutiny under the intermediate scrutiny or rational basis tests.

Under intermediate scrutiny, attempts by the government to try to explain away the discrimination in the tariff "must be genuine, not hypothesized or invented *post hoc* in response to litigation." *United States v. Virginia*, 518 U.S. 515, 533 (1996). The government may not rely on economic conditions (or any other reasons) at the time of the discrimination's inception when those conditions, even if they existed, were not the actual reason for the discrimination in the tariff. In any event, should the trial court find it necessary to examine factors such as whether men's and women's gloves travel in different channels of trade or present different commercial issues with respect to the domestic industry, *amici* predict the evidence will show that men's and women's gloves, in fact, are *not* separate commodities, contrary to the conclusion of the Federal Circuit.

Even assuming *arguendo* that men's and women's gloves are separate commodities that move in different channels of trade and present different commercial

issues in the domestic market, those facts do not determine whether Totes has adequately pleaded an Equal Protection Clause violation. As the only distinctions in the tariff are based on gender or age, the alleged reasons for these distinctions do not justify dismissal for failure to state a claim.[5]

II. Totes Has Met the Pleading Standard of *Bell Atlantic Corp. v. Twombly.*

To state a well plead claim, U.S. Court of International Trade Rule 8(a)(2) requires only "a short and plain statement of the claim showing that the pleader is entitled to relief."[6] To satisfy this rule, this Court has held that "stating such a claim requires a

5. Congress could have based the duty differences, for example, on the size of gloves, assuming that men's gloves use more leather than women's gloves and thus, perhaps present different commercial issues in the domestic market, but the fact remains that the tariff does not discriminate based on those physical differences. Instead, Congress chose to subclassify seamed leather gloves into gender and age distinctions. A tariff that sets different duty rates based solely on gender or age is discriminatory on its face in contravention of the Equal Protection Clause. It is even questionable whether duty differences based on physical characteristics of the gloves would be constitutional. One would assume that larger gloves are used by men, and smaller gloves are used by women. If the duty rate was higher on larger gloves, then arguably, such veiled distinctions may cause disparate impact on men and "[a] statute, otherwise neutral on its face, must not be applied so as invidiously to discriminate." *Washington v. Davis*, 426 U.S. 229, 241 (1976) (*citing Yick Wo v. Hopkins*, 118 U.S. 356 (1886)).

6. CIT Rule 8(a)(2) is identical to Federal Rule of Civil Procedure 8(a)(2).

complaint with enough factual matter (taken as true) to suggest that" a claim is "plausible." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

In *Twombly*, this Court abrogated the statement in *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957), that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Twombly*, 550 U.S. at 561 (*quoting Conley*, 355 U.S. at 45-46). *Twombly* acknowledged that this language, in isolation, could mean that "a wholly conclusory statement of claim would survive a motion to dismiss whenever the pleadings left open the possibility that a plaintiff might later establish some 'some set of [undisclosed] facts' to support recovery." *Twombly*, 550 U.S. at 561 (alteration in original). However, *Twombly* did "not apply any 'heightened' pleading standard." *Id.* at n.14. The Court's "concern [was] not that the allegations in the complaint were insufficiently 'particular[ized]", rather, the complaint warranted dismissal because it failed *in toto* to render plaintiffs' entitlement to relief plausible." *Id.* (alterations in original, citation omitted). That is not the case here.

In holding that taxation must always be reviewed under the rational basis test, it appears that the Federal Circuit applied a rational basis standard to determine whether Totes even stated a claim. *Totes-Isotoner Corp.*, 594 F.3d at 1354 ("[T]axation of property cannot discriminate between items of property of the 'same class,' [and] allegations of such discrimination are judged under the rational basis test."). In so holding, the Federal

Circuit incorrectly heightened the pleading standard, concluding that Totes failed to meet this burden and did not state a valid Equal Protection claim. Not only was this contrary to *Twombly*, which requires plaintiff to plead "with enough factual matter (taken as true) to suggest that" a claim is "plausible," *Twombly*, 550 U.S. at 556, it also illogically sets the pleading bar higher than what Totes would need to prove to succeed on the merits, *viz.*, intermediate scrutiny.

Totes has met the plausibility standard of *Twombly*. As discussed below, the legislative history to the HTSUS, including the Tariff Classification Study and congressional tariff hearings, support Totes' claims that gender- and aged- based tariffs violate the Equal Protection Clause. The legislative history presents "enough fact to raise a reasonable expectation that discovery [or further proceedings on the merits] will reveal evidence of illegal [conduct]," *Twombly*, 550 U.S. at 556, such that Totes stated a claim and the case should proceed to consideration on the merits.

III. Legislative History Supports Totes' Claims that the Gender- and Age-Based Tariffs Appearing in the HTSUS Violate the Equal Protection Clause.

A. The Tariff Classification Study Casts Doubt on the Justification for Duties Discriminating on the Basis of Gender or Age.

The Federal Circuit mistakenly ignored the Tariff Classification Study of 1960 when it concluded that alleged sourcing differences for men's and women's gloves negated Totes' argument that the tariff

discriminates on the basis of gender and age rather than between different classes of property. Pursuant to the Customs Simplification Act of 1954, the Tariff Commission was tasked with making "a comprehensive study of U.S. laws prescribing the tariff status of imported articles" and preparing "the [Tariff Schedules of the United States] and an accompanying report, the Tariff Classification Study." *Eastalco Aluminum Co. v. United States*, 916 F.2d 1568, 1569 (Fed. Cir. 1990). The Tariff Classification Study constitutes legislative history to the TSUS, the predecessor to the HTSUS, and is relevant to its interpretation. *See Nissho Iwai American Corp. v. United States*, 143 F.3d 1470, 1473 (Fed. Cir. 1998); *see also Lonza, Inc. v. United States*, 46 F.3d 1098, 1107 (Fed. Cir. 1995) (reviewing Tariff Classification Study to interpret a TSUS term carried over into the HTSUS).[7]

In discussing duty rates on footwear, the Tariff Classification Study highlighted the problems associated with gender- and age-based distinctions and cast doubt on the justification for duties discriminating on that basis:

> The proposed [TSUS provision] combines all McKay-sewed leather footwear in one tariff

7. This Court can take judicial notice of the Tariff Classification Study. *See Carolene Products Co. v. United States*, 323 U.S. 18, 28 (1944) (holding that this Court may take judicial notice of congressional reports that show the considerations that influenced legislation at issue); *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 153 (2nd Cir. 2002) (in context of motion to dismiss, a court may consider matters of which judicial notice may be taken as well as documents in plaintiff's possession which are relied upon in bringing suit).

> provision at the rate of 20 percent ad valorem, thereby eliminating present distinctions . . . according to the age and sex of the wearer for which the footwear is designed. *These distinctions are often difficult if not impossible to make and their economic justification is questionable.*

Tariff Classification Study, Schedule 7, U.S. Tariff Commission 21-22 (1960) (emphasis added). Thus, the government itself questioned the economic justification of gender- and age-based tariff distinctions and recommended elimination of these distinctions. This official legislative history undercuts the Federal Circuit's reasoning that men's apparel is *prima facie* a separate and distinct commodity from apparel for women and children, and it also demonstrates that Totes has plead a "plausible" and legitimate equal protection claim that must withstand the government's motion to dismiss. *Twombly*, 550 U.S. at 556.

The Tariff Commission also questioned gender- and age-based tariff rate discriminations when it explained why the Tariff Commission established a single duty rate for cemented footwear in the TSUS:

> [W]e further propose that the rate of duty for column 1 on this new category, "cemented footwear," be 20 percent. . . . The present schedule provides under the classification of "Other," "If men's youth's or boy's [sic], 10 percent; if for other persons" - which would include women's - "20 percent." *And we feel that the [Tariff] Commission is acting wisely*

> *in its proposal to eliminate differentiation by gender, and we would not recommend continuing that differentiation,* and that is the reason why we have established the single rate for cemented footwear in our proposal.

Tariff Classification Study, Schedule 7, U.S. Tariff Commission 647 (1960) (emphasis added).

These passages from the Tariff Classification Study demonstrate that the government was acutely aware that gender- and age-based duty differences in the tariff could be problematic. The Tariff Commission's opinion that economic justifications for such gender- and age-based distinctions were "questionable," and its recommendation that the TSUS "eliminate differentiation by gender," indicate that the government cannot show that a higher tariff on men's gloves is substantially related to an important governmental interest under intermediate scrutiny. Nor can the government show that such gender and age distinctions in the tariff are even rationally related to a legitimate interest.

The Tariff Classification Study constitutes the government's own opinion concerning such distinctions and its language is a strong indication that duties discriminating on the basis of age or gender serve no legitimate economic purpose. Even if that were not the case, this legislative history proves that at the very least, Totes has identified evidence of allegedly illegal conduct and thereby stated a "plausible" equal protection claim pursuant to *Twombly*, 550 U.S. at 556.

B. Congressional Hearings on Tariffs Undermine the Federal Circuit's Assumption that the Current 1.4% Difference in Duty Between Men's and Women's Gloves Will Foster the Glove Industry Even if Rational Basis is Applied.

Tariff hearings before the Committee on Ways and Means of the House of Representatives, dating back as early as the 1890s, further undermine the Federal Circuit's reasoning that the government satisfied the rational basis test when considering whether "taxation of property . . . discriminate[s] between items of property of the 'same class.'" *Totes-Isotoner Corp.*, 594 F.3d 1346, 1354 (Fed. Cir. 2010). A review of those hearings reveals that no governmental interest is actually achieved by the current 1.4% difference in duty between men's and women's gloves. The hearings demonstrated that the duty rate on men's gloves would need to be increased *significantly* to foster, create or protect any current glove industry, thus dispelling any notion that a 1.4 percentage point differential would serve a protectionist interest that could somehow defeat Totes' claim for relief on a Rule 12(b) motion to dismiss.

As discussed above, the Federal Circuit incorrectly applied the rational basis test to Totes' pleading requirements. But, even if the Federal Circuit is correct that a rational basis test applies, the legislative history undermines the court's reasoning that a higher tariff on men's leather seamed gloves advances a governmental interest in protecting the glove industry. For example, in January 1897, during congressional tariff hearings, Mr. Lucius W. Littauer, a glove manufacturer in New York City, offered the following

written testimony about the effect of tariff rates on the glove industry at that time:

> In all tariffs up to 1890, gloves paid a rate of 50 per cent. The rate imposed, nevertheless, was simply a revenue duty, not sufficient to foster glove making in this country. . . .
>
> In the tariff of 1890 a composite specific and ad valorem rate was placed on gloves and advanced on former rates, but not high enough to permit the manufacture of ladies' gloves here. *The rates on men's gloves, were, however, advanced to 66 per cent [from 50 per cent], and there was immediately developed a large industry*, giving employment to thousands of working people.

Tariff Hearings Before the Comm. on Ways and Means, 54th Cong. 1927-28 (1897) (statement of Lucius W. Littauer) (emphasis added). This written testimony demonstrates that a tariff rate as high as 66%, an increase of 16 percentage points from the established rate (and the women's rate), was required to foster and protect the men's glove industry in the 1890s.

Similarly, in 1909, the Glove Manufacturers' Association of the United States discussed at length the history of tariffs on gloves and the need for a significant increase in the duty rate on men's gloves to create and promote the men's glove industry:

> Before the McKinley Act of 1890 there was no glove industry in the United States competing in our markets with the foreign-made gloves. . . .

> In the consideration of the McKinley bill the question of giving protection, so as to build up an American industry, was thoroughly investigated, with the conclusion that such opportunity was given on men's gloves, while leaving the women's gloves on a purely revenue basis. . . . *The McKinley bill imposed, in addition to the previous 50 per cent ad valorem rate, $1 per dozen extra on men's gloves. From the date of its enactment the American fine-glove industry had its start. . . .*
>
> *The Wilson bill of 1893 for the first time placed exclusively specific duties on gloves, and moreover, after the fullest and most careful study of the problem, gave increased rates of duty on men's gloves, while lowering the duty on women's gloves, in specific form, to about one-half the rates which maintained under the McKinley bill. . . .*
>
> When the Dingley Act of 1897 was under consideration these facts were clearly presented, and a demand was made for the continuance of the duties on men's gloves which was agreed to.

Tariff Hearings before the House Comm. on Ways and Means, 60th Cong. 7120-21 (1909) (statement of the Glove Manufacturers' Association of the United States) (emphasis added).

Like the 1897 testimony of the members of the glove industry, the 1909 testimony of the glove manufacturers' association also shows that significant increases in the duty rate were needed to foster the men's glove industry. The testimony makes clear that it was not until large increases in the tariff were enacted that the domestic industry bloomed. Indeed, to foster the industry, more than one significant increase in duty was enacted between the 1890 McKinley bill and the 1897 Dingley Act.

Such a small difference in duty rates between men's and women's gloves bears no meaningful relation to the domestic glove industry. If in the late nineteenth and early twentieth centuries a duty increase of 16 percentage points and a $1.00 per dozen were required to create, foster and protect a domestic men's glove industry, then it is impossible for a 1.4% difference in duty to protect any men's glove industry in the United States today, or otherwise to be substantially related to serving a legitimate governmental interest.[8] The Federal Circuit was incorrect to conclude otherwise, and should certainly not have used a merits-based rational basis test to conclude that Totes' failed to state a claim of gender discrimination that would be reviewed under intermediate scrutiny on the merits.

8. To date, there has been no suggestion by the parties or the lower courts that a domestic glove industry even exists today, let alone one that could be impacted by the small duty differential at issue in this case.

CONCLUSION

For the foregoing reasons, *amici curiae* Columbia Sportswear Company, Mountain Hardwear, Payless ShoeSource, Inc., The Stride Rite Corporation, and Mia Shoes, Inc., respectfully urge this Court to grant the petition for a writ of certiorari.

Respectfully submitted,

STEVEN H. BECKER
Counsel of Record
SUZANNE I. OFFERMAN
BAKER & MCKENZIE LLP
1114 Avenue of the Americas
New York, NY 10036-7703
(212) 626-4100
Steven.Becker@bakermckenzie.com

Counsel for Amici Curiae